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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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ERIC REASON, an individual;
STEPHANIE BASS, an individual;
RASHEED REASON, individually and
as Co-Successor-in-Interest to
Decedent ERIC REASON II; TYRIQUE
REASON, individually and as Co-
Successor-in-Interest to
Decedent ERIC REASON II; K.R.,
individually and as Co-
Successor-in-Interest to
Decedent ERIC REASON II, by and
through his Guardian Ad litem
LATISHA PARKER; P.R.,
individually and as Co-
Successor-in-Interest to
Decedent ERIC REASON II, by and
through his Guardian Ad Litem
LATISHA PARKER; N.M.,
individually and as Co-
Successor-in-Interest to
Decedent ERIC REASON II, by and
through his Guardian Ad Litem
NIA MILLS; E.L.R., individually
and as Co-Successor-in-Interest
to Decedent ERIC REASON II, by
and through his Guardian Ad
Litem SHAWNTAY DAVIS; I.R.V.,
individually and as Co-
Successor-in-Interest to
Decedent ERIC REASON II, by and
through his Guardian Ad Litem
JULIA VELASQUEZ;

No. 20-cv-01900-WBS-JDP

MEMORANDUM AND ORDER RE:
DEFENDANT CITY OF RICHMOND'S
MOTION TO DISMISS

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Plaintiffs,

v.

CITY OF RICHMOND, a municipal
corporation; the ESTATE OF
VIRGIL THOMAS, individually and
in his capacity as Police
Sergeant for the CITY OF
RICHMOND,

Defendants.

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Plaintiffs Eric Reason, Stephanie Bass, Rasheed Reason, Tyrique Reason, and the minor children of the decedent Eric Reason II ("plaintiffs") brought this action against the City of Richmond ("Richmond") and the Estate of Richmond Police Sergeant Virgil Thomas ("Sergeant Thomas"), seeking damages against Sergeant Thomas for excessive force and violation of the decedent's civil rights under 42 U.S.C. § 1983, and violation of the plaintiff's Fourteenth Amendment rights to a familial relationships under 42 U.S.C. § 1983. Plaintiffs additionally seek damages against both Sergeant Thomas and Richmond for state law claims of wrongful death and negligence under California Code of Civil Procedure 377.60 and 377.61; violation of the Tom Bane Civil Rights Act, Cal. Civ. Code § 52.1; and battery. (See generally Second Am. Compl. ("SAC") (Docket No. 39.))

Before the court is Richmond's Motion to Dismiss. (Docket No. 40.)

I. Factual Background

Plaintiffs allege that on November 10, 2019, Sergeant Thomas and decedent Eric Reason II became embroiled in a heated

1 verbal confrontation over a parking spot at a Valero gas station
2 in the City of Vallejo, California. (See SAC at ¶ 20.)¹ Mr.
3 Reason walked back toward his van after exchanging words with
4 Sergeant Thomas. (See id. at ¶ 21.) After Mr. Reason turned his
5 back, Sergeant Thomas pulled a concealed gun out of his
6 waistband. (See id. at ¶ 22.) Sergeant Thomas identified
7 himself as a police officer and opened fire into the back of Mr.
8 Reason's body, simultaneously firing numerous rounds in the
9 direction of operational gas pumps, an occupied car, and into the
10 parking lot of a busy gas station. (See id.) Mr. Reason began
11 running for his life, screaming "Don't let him kill me!" (See
12 id. at ¶ 23-24.) Sergeant Thomas came out from behind a large
13 vehicle, chased after Mr. Reason, and shot him in the back of the
14 head from a distance of approximately 50-60 feet. (See id. at ¶
15 23.) Mr. Reason never raised or pointed a weapon at Sergeant
16 Thomas or anyone else prior to being shot. (See id. at ¶ 25.)

17 Sergeant Thomas again identified himself as a police
18 officer and showed his badge to deter witnesses from attending to
19 Mr. Reason. (See id. at ¶ 26.) Sergeant Thomas contacted police
20

21 ¹ In plaintiffs' initial complaint, they alleged that
22 Sergeant Thomas was "on administrative leave at the time of the
23 incident." (See Compl. at ¶ 46.) (Docket No. 1.) It is well
24 established that an "amended complaint supersedes the original
25 complaint, the latter being treated thereafter as nonexistent."
26 See Ramirez v. Cnty. of San Bernardino, 806 F.3d 1002, 1008 (9th
27 Cir. 2015). However, a party cannot amend pleadings to "directly
28 contradic[t] an earlier assertion made in the same proceeding."
See Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990). The
court will therefore assume the truth of plaintiffs' initial
allegation that Sergeant Thomas was on administrative leave at
the time of the incident, even though plaintiffs omitted this
allegation in their Second Amended Complaint.

1 dispatch, identified himself as a Richmond Police Department
2 Sergeant, and reported shooting Mr. Reason. (See id. at ¶ 28.)
3 Vallejo police officers responded to the scene and initiated the
4 Solano County Officer Involved Shooting Protocol. (See id. at ¶
5 29.) However, the Vallejo police officers failed to sequester or
6 remove Sergeant Thomas from the crime scene. (See id.) Vallejo
7 Police Officers permitted Sergeant Thomas to walk around the
8 crime scene, stand inches from Mr. Reason's head, and take photos
9 of Mr. Reason's body. (See id. at ¶ 30.)

10 II. Procedural Background²

11 In their initial complaint, plaintiffs asserted only a
12 single cause of action against Richmond and Richmond Chief of
13 Police Bisa French, which was predicated upon an alleged
14 violation of Monell v. Department of Social Services of the City
15 of New York, 436 U.S. 658, 694 (1978). (See Compl. at ¶¶ 80-94.)
16 Following receipt of plaintiffs' initial complaint, the City and
17 Chief French moved to dismiss the claims asserted against each of
18 them. (See Docket Nos. 8-9.) On January 12, 2021, the court
19 granted these motions and allowed plaintiffs twenty days to file
20 an amended pleading. (See Docket No. 21.) In other words, the
21 deadline for plaintiffs to file an amended pleading was February
22 1, 2021.

23
24 ² Richmond requests that the court take judicial notice
25 of Exhibit A, excerpts of the video footage from the November 10,
26 2019 incident underlying this action, and Exhibit B, the city's
27 written rejection of plaintiffs' claims pursuant to California
28 Government Code Section 913. (See Defs.' Request for Judicial
Notice ("RJN") at Exs. A-B.) (Docket No. 40-2.) Plaintiffs do
not oppose Richmond's request. Accordingly, the court will take
judicial notice of Exhibits A and B.

1 On February 1, 2021, plaintiffs filed their First
2 Amended Complaint, which named only Sergeant Thomas as a
3 defendant. (See First Am. Compl. ("FAC") (Docket No. 22.))
4 Plaintiffs did not name Richmond as a defendant in the caption,
5 the section delineating the "parties" in the case, or in the
6 prayer for damages, although the FAC did state that "[t]he City
7 of Richmond maintains respondeat superior liability for the
8 actions of their employee, Defendant Virgil Thomas." (See FAC at
9 ¶¶ 15, 18.) On February 1, 2021, plaintiffs' counsel, Melissa
10 Nold, emailed Richmond's counsel, Kevin Gilbert, informing him
11 that "[t]he City of Richmond will not be a named defendant, but
12 they will still be obligated to defend their employee." (See
13 Decl. of Kevin Gilbert ("Gilbert Decl.") in Supp. of Mot. to
14 Dismiss at Ex. 1 at 3.) (Docket No. 40-1.) Mr. Gilbert emailed
15 Ms. Nold on February 2, 2021 that he would not be representing
16 Sergeant Thomas -- the only remaining defendant. (See id. at 1.)
17 Ms. Nold responded that Richmond was "contractually obligated to
18 indemnify [Sergeant Thomas] since he identified himself as a
19 police officer prior to the shooting, so I'm just trying to
20 figure out who I need to speak to regarding the city's defense of
21 Mr. Thomas." (See id.)

22 On February 2, 2021, plaintiffs filed a Second Amended
23 Complaint, without leave of court, which again did not list
24 Richmond as a defendant in the caption, parties section, or
25 prayer for relief. The Second Amended Complaint did specify,
26 however, that the third cause of action for wrongful death --
27 negligence and the fourth cause of action for violation of the
28 Tom Bane Civil Rights Act were against both Richmond and Sergeant

1 Thomas. (See Docket No. 23.) That Second Amended Complaint also
2 stated in its "factual allegations" section that the City of
3 Richmond was liable for Sergeant Thomas's actions under a theory
4 of respondeat superior, (see id. at ¶¶ 15, 18.), and was
5 vicariously liable pursuant to California Government Code § 815.2
6 for the violation of its rights by its employees and agents.
7 (See id. at ¶¶ 53, 58, 63.)

8 On March 1, 2021, plaintiffs filed a "Corrected Second
9 Amended Complaint", again without leave of court. (See Docket
10 No. 30.) This "Corrected Second Amended Complaint" did list the
11 City of Richmond as a defendant in the caption and the parties
12 section, again stated that the third and fourth causes of action
13 were against Richmond and Sergeant Thomas, and also added that
14 the fifth cause of action for battery was against both Richmond
15 and Sergeant Thomas. (See Docket No. 30.) Plaintiffs contended
16 that they had inadvertently filed the wrong version of the Second
17 Amended Complaint on February 2, 2021 and did not realize it
18 until March 1, 2021 when working with defendants to complete
19 their joint status report. (See Docket No. 34.)

20 On March 16, 2021, the court issued an order striking
21 both Second Amended Complaints because plaintiffs did not seek
22 leave to file these pleadings and they were filed after the 20-
23 day period to amend had expired. (See Docket No. 33.)
24 Plaintiffs thereafter sought leave to file a Second Amended
25 Complaint which the court granted on April 13, 2021. (See Docket
26 No. 38.) Plaintiffs' filed the operative Second Amended
27 Complaint on April 14, 2021. (See generally SAC.)

28 III. Discussion

1 Federal Rule of Civil Procedure 12(b)(6) allows for
2 dismissal when the plaintiff's complaint fails to state a claim
3 upon which relief can be granted. See Fed. R. Civ. P. 12(b)(6).
4 The inquiry before the court is whether, accepting the
5 allegations in the complaint as true and drawing all reasonable
6 inferences in the plaintiff's favor, the complaint has stated "a
7 claim to relief that is plausible on its face." Bell Atl. Corp.
8 v. Twombly, 550 U.S. 544, 570 (2007). "The plausibility standard
9 is not akin to a 'probability requirement,' but it asks for more
10 than a sheer possibility that a defendant has acted unlawfully."
11 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "Threadbare
12 recitals of the elements of a cause of action, supported by mere
13 conclusory statements, do not suffice." Id. Although legal
14 conclusions "can provide the framework of a complaint, they must
15 be supported by factual allegations." Id. at 679.

16 A. Government Claims Act

17 Richmond argues that all of plaintiffs' state law
18 claims against it are untimely and barred by the California
19 Government Claims Act. (See Mot. to Dismiss at 6.) The
20 California Government Claims Act requires presentation of a claim
21 as a condition precedent to maintaining any cause of action
22 seeking damages against a public entity. See Cal. Gov't. Code §
23 905; see City of San Jose v. Superior Court, 12 Cal. 3d 447, 454
24 (1974). Compliance with the claims statute is mandatory and
25 failure to file a claim is fatal to the cause of action. See id.
26 (internal citations omitted). If the public entity provides a
27 timely, statutory written notice denying that claim, then the
28 claimants are required to commence suit on those claims no later

1 than six months from denial. See Cal. Gov't. Code § 945.6. Six
2 months has been interpreted to mean six calendar months or 182
3 days, whichever is later. See Gonzalez v. Cnty. of Los Angeles,
4 199 Cal. App. 3d 601, 604 (2d Dist. 1988). The period is
5 extended if the deadline falls on a holiday, which by statute
6 includes Saturdays and Sundays. Deleon v. Bay Area Rapid Transit
7 Dist., 33 Cal. 3d 456, 460 (1983).

8 Plaintiffs were required to present a Government Claim
9 to Richmond prior to commencing suit against Richmond. (See Cal
10 Gov't. Code § 905.) Plaintiffs presented their Government Claim
11 to Richmond on February 13, 2020, which was formally rejected on
12 March 20, 2020. (See Request for Judicial Notice at Ex. B.)
13 Plaintiffs had only six months from this date to commence
14 litigation. (See Cal. Gov't. Code § 945.6(a)(1).) Plaintiffs
15 filed their Complaint on September 21, 2020, the last day
16 possible under the statute of limitations. (See generally
17 Compl.) (Docket No. 1.) However, Richmond points out that this
18 complaint asserted only a single claim against Richmond under
19 federal law. Richmond contends that because plaintiffs only
20 added state law claims against it after September 21, 2020,
21 plaintiffs' assertion of state law claims fell outside the
22 statutory time period under the Government Claims Act.³ (See Mot.

23 ³ Although Richmond argues that the Government Claim
24 submitted by plaintiffs only applied to their federal claim, (see
25 Mot. to Dismiss at 7.), the California Government Claims Act does
26 not apply to actions arising under the United States Constitution
27 or under federal law. See Martin D. Carr & Ann Taylor Schwing,
28 Cal. Affirmative Def. Government Claims Act -- Actions Subject to
Claim Filing Requirement, § 12.21 (2d. Ed. 2021); see also Karim-
Panahi v. Los Angeles Police Dept., 839 F.2d 621, 627 (9th Cir.
1988) (holding that plaintiff's pendent state law claims were

1 to Dismiss at 7.)

2 Under Rule 8, in order to state a claim against a
3 defendant, a plaintiff must provide "a short and plain statement
4 of the claim showing that the pleader is entitled to relief in
5 order to give the defendant fair notice of what. . . the claim is
6 and the grounds upon which it rests." Twombly, 550 U.S. at 555
7 (internal citations omitted). While plaintiffs' original
8 complaint may not have clearly labeled their claim for respondeat
9 superior against Richmond as a separate "claim", the complaint
10 explicitly states that "[t]he City of Richmond [is] being sued .
11 . . under the theory of respondeat superior, for all actions
12 taken by Defendant agents of the City of Richmond. . . " (See
13 Compl. at ¶ 25.) This allegation that the City was vicariously
14 liable for the conduct of Sergeant Thomas' actions and was "being
15 sued" under a theory of respondeat superior was sufficient to put
16 Richmond on notice of the claim against it and the grounds for
17 that claim (Thomas' actions and the City's relationship with him
18 as his employer). See Twombly, 550 U.S. at 555. The court
19 therefore finds that plaintiffs' initial complaint adequately
20 pled a state law claim of respondeat superior against Richmond.

21 Richmond alternatively argues that even if plaintiffs'
22 initial allegations of respondeat superior liability were timely,
23 their state law claims against Richmond became time barred when
24 plaintiffs filed the First Amended Complaint which removed
25 Richmond as a defendant. (See Mot. to Dismiss at 7.) Under

26 properly dismissed for failure to allege compliance with the
27 California Government Claims Act prior to commencing suit but
28 permitting plaintiffs' 42 U.S.C. § 1983 claims to proceed).

1 California law, "a party's voluntary dismissal without prejudice
2 does not come equipped by law with an automatic tolling or waiver
3 of all relevant limitations periods; instead, such a dismissal
4 includes the very real risk that an applicable statute of
5 limitations will run before the party is in a position to renew
6 the dismissed cause of action." See Martell v. Antelope Valley
7 Hosp. Med. Ctr., 67 Cal. App. 4th 978, 984 (2d Dist. 1998.) Any
8 claims that are voluntarily dismissed will be considered waived
9 if not replead. See Lacey v. Maricopa Cnty., 693 F.3d 896, 928
10 (9th Cir. 2012).

11 Richmond's alternative argument fails for similar
12 reasons as its first argument. Although plaintiffs omitted
13 Richmond as a named defendant in their First Amended Complaint,
14 they still maintained that Richmond was liable under a theory of
15 respondeat superior. (See FAC at ¶¶ 15, 18.) Indeed, plaintiffs
16 have alleged that Richmond is vicariously liable for Sergeant
17 Thomas's actions under a theory of respondeat superior in each
18 iteration of their complaint. (See Compl. at ¶ 25); (see FAC at
19 ¶¶ 15, 18); (see Docket No. 23 at ¶¶ 15, 18, 53, 58, 63); (see
20 SAC at ¶¶ 14, 15, 18, 55, 60, 66). Plaintiffs were then granted
21 leave to file a Second Amended Complaint, and they subsequently
22 explicitly named Richmond as a defendant and detailed the state
23 law causes of action for which they contend Richmond is
24 vicariously liable. (See generally SAC.) Plaintiffs have
25 sufficiently given Richmond "fair notice" of what the respondeat
26 superior claim against it is and "the grounds upon which it
27 rests." See Twombly, 550 U.S. at 555.

28 To say that plaintiffs' counsel was imprecise in

1 drafting the First Amended Complaint is an understatement.
2 Nevertheless, plaintiffs have never voluntarily dismissed their
3 respondeat superior claims against Richmond because they have
4 consistently reiterated such allegations throughout the course of
5 this litigation. (See Opp'n to Mot. to Dismiss at 11.) (Docket
6 No. 41.) To throw plaintiffs' case out on such a technicality
7 would only serve to punish the plaintiffs for the sloppiness of
8 their counsel, and the court declines to do so. Accordingly, the
9 court concludes that plaintiffs' state law claims against the
10 City are not barred for failure to present a claim under the
11 Government Claims Act.

12 B. Scope of Employment

13 Under California law, a government entity can only be
14 sued in tort pursuant to an authorizing statute or enactment.
15 See Van Ort v. Estate of Stanewich, 92 F.3d 831, 840 (9th Cir.
16 1996). California Government Code § 815.2(a) provides:

17 A public entity is liable for injury proximately
18 caused by an act or omission of an employee of
19 the public entity within the scope of his
20 employment if the act or omission would, apart
21 from this section, have given rise to a cause of
22 action against that employee or his personal
23 representative.

24 See Cal. Gov. Code § 815.2(a). "[A]n employer is vicariously
25 liable for his employee's torts committed within the scope of the
26 employment." Perez v. Van Groningen & Sons, Inc., 41 Cal. 3d
27 962, 967 (1986). Courts may find vicarious liability for
28 unauthorized or prohibited conduct if the risk of that conduct is
one "typical of or broadly incidental to the enterprise
undertaken by the employer." See id. at 968. (citing Rodgers v.

1 Kemper Constr. Co., 50 Cal. App.3d 608, 619 (1975) (internal
2 quotations omitted)). Essentially, the employer's liability
3 extends beyond its actual or possible control of the employee to
4 include risks inherent in or created by the enterprise. Id.

5 An employer is not vicariously liable where the
6 employee has substantially deviated from his duties for personal
7 purposes. Id. (citing Hinman v. Westinghouse Elec. Co., 2 Cal.3d
8 956, 960 (1970)). "[V]icarious liability has been deemed
9 inappropriate where the misconduct does not arise from the
10 conduct of the employer's enterprise but instead arises out of a
11 personal dispute." See Lisa M. v. Henry Mayo Newhall Mem'l.
12 Hosp., 12 Cal. 4th 291, 301 (1995) (internal citations omitted).
13 Whether an employee has acted within the scope of employment is
14 ordinarily a question of fact reserved for the jury; it becomes a
15 question of law only where "the facts are undisputed and no
16 conflicting inferences are possible." See id. at 299. (internal
17 citations omitted).

18 Richmond contends that because plaintiffs have
19 affirmatively alleged that Sergeant Thomas was engaged in a
20 personal dispute over a parking space outside of his jurisdiction
21 and have not alleged that Sergeant Thomas was on duty at the time
22 of the shooting, they have failed to adequately allege that
23 Sergeant Thomas was acting within the scope of his employment --
24 a necessary element for all of plaintiffs' claims against
25 Richmond. (See Mot. to Dismiss at 9-13.)

26 Plaintiffs principally rely on Bradley v. County of San
27 Joaquin, Case No. 2:17-cv-2313-KJM-AC, 2018 WL 4026996, * 1-6
28 (E.D. Cal. Aug. 23, 2018), to support their contention that an

1 off-duty officer can act within the scope of his employment under
2 California law even when pursuing personal goals. In Bradley, an
3 off-duty San Joaquin County Sheriff's deputy was engaged in an
4 illicit transaction at his apartment complex. See id. at 1.⁴
5 The court nevertheless found that plaintiffs successfully alleged
6 that the defendant acted within his scope of employment once he
7 invoked his status as a law enforcement officer, issued commands,
8 shot the decedent, relied on his law enforcement status to take
9 control of the scene after discharging his weapon, and
10 coordinated with San Joaquin County personnel responding to the
11 scene in the aftermath of the incident. See id. at *6.

12 Accepting the allegations of the Second Amended
13 Complaint as true, as in Bradley, Sergeant Thomas was off-duty
14 when he pulled a concealed gun out of his waistband, identified
15 himself as a police officer, and opened fire upon the decedent.
16 (See SAC at ¶ 22.) Sergeant Thomas then "identified himself as a
17 police officer and showed his badge to deter witnesses from
18 attending to Mr. Reason." (See id. at ¶ 26.) Plaintiffs also
19 allege that Sergeant Thomas coordinated with the Vallejo Police
20 Department by identifying himself as a Richmond Police Sergeant
21 when calling the police for backup, and that the Vallejo Police
22 Department subsequently initiated the Solano County Officer

23
24 ⁴ Richmond contends that Bradley involved a plain clothes
25 or undercover deputy effecting an arrest in his own jurisdiction.
26 (See Reply in Supp. of Mot. to Dismiss at 10.) (Docket No. 42.)
27 To the contrary, Bradley involved an off-duty, out of uniform
28 sheriff's deputy who was allegedly illegally dealing narcotics at
his apartment complex. Despite this, the Bradley court still
found that plaintiffs had adequately alleged that the defendant
sheriff's deputy was acting within the scope of his employment.
See Bradley, 2018 WL 4026996 at * 6.

1 Involved Shooting Protocol and allowed Sergeant Thomas to walk
2 freely around the crime scene and take photographs of Mr. Reason.
3 (See id. at ¶¶ 28-30.) As in Bradley, these alleged facts
4 further support an inference that Sergeant Thomas's conduct was
5 within the scope of his employment.⁵

6 Richmond is correct that "[a] police officer's
7 authority is normally limited to the boundaries of the
8 jurisdiction for which he is appointed" and that "[w]hen he acts
9 outside his jurisdiction he is generally acting as a private
10 person." See People v. Rogers, 241 Cal. App. 2d 384, 387-99 (2d
11 Dist. 1966). Richmond argues that this issue is particularly
12 salient here given plaintiffs' allegation in their initial
13 complaint that Sergeant Thomas was "on administrative leave at
14 the time of the incident." (See Mot. to Dismiss at 13); (See
15 Compl. at ¶ 46.) However, Richmond has pointed to no binding or
16 persuasive authority which states that police officers on
17 administrative leave or outside their jurisdiction are per se
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19 ⁵ Richmond is correct that the court in Bradley stated
20 that, "[c]onstruing the factual allegations and all reasonable
21 inferences in favor of plaintiffs, the court found that
22 [defendant's] drawing of a concealed firearm, identifying himself
23 as an officer and commanding others to "Get down" signaled that
24 [defendant] sought to detain or arrest someone before he fired
25 his firearm." See Richmond, 2018 WL 4026996, * 6; (See Reply in
26 Supp. of Mot. to Dismiss at 10.) Although the present case is
27 distinguishable because plaintiffs do not allege that Sergeant
28 Thomas was attempting to arrest or detain Mr. Reason before he
fired his weapon, this fact is not determinative. The Bradley
court was primarily focused on the fact that the defendant
"invoked his status as a law enforcement officer, issued commands
. . . and relied on his status to take control of the scene after
discharging his weapon . . ." in determining whether plaintiffs
had adequately alleged that defendant was acting within the scope
of his employment. See id.

1 unable to act within the scope of their employment, nor has the
2 court found any. Therefore, construing the factual allegations
3 and all reasonable inferences in favor of plaintiffs, the court
4 finds that plaintiffs have sufficiently pleaded that Sergeant
5 Thomas's conduct was within the scope of his employment.

6 IT IS THEREFORE ORDERED that the City of Richmond's
7 motion to dismiss (Docket No. 40), be, and the same hereby is,
8 DENIED.

9 Dated: June 3, 2021



10 **WILLIAM B. SHUBB**
11 **UNITED STATES DISTRICT JUDGE**
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